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No. 885

IN THE

Supreme Court of the United States

October Term, 1958

OWENSBORO ON THE AIR, INC., and OWENSBORO PUBLISHING COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief for
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.
In Opposition

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OPINIONS BELOW

The opinion of the court below (Pet. App. 1a-16a) is reported at 262 F.2d 702. The underlying reports and orders of the Federal Communications Commission (R. 755-770, 919-923) are reported at 22 FCC 382 (1957) and 23 FCC 49 (1957).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the action

of the Commission, was entered on December 18, 1958 (Pet. App. 17a). Rehearing *en banc* was denied February 2, 1959 (Pet. App. 17a). The petition for a writ of certiorari was filed on May 1, 1959. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the notice of proposed rule making pursuant to which the Commission subsequently "deintermixed" the Evansville-Hatfield (Ind.) area satisfied the notice requirements of Section 4 of the Administrative Procedure Act (5 U.S.C. Sec. 1003).

STATUTE INVOLVED

The pertinent provisions of Section 4 of the Administrative Procedure Act (5 U.S.C. Sec. 1003) are set forth in petitioners' brief (p. 3).

STATEMENT

In television, unlike standard (AM) broadcasting, the only channels which an applicant may apply for in a given community are those specifically allocated to that community by the Commission's nationwide table of television assignments (1 Pike and Fischer, *Radio Regulation* 53:606).[1] Changes in that table are effectuated through rule-making proceedings (1 RR 53:607(a), 610). However, a channel allocated to a given city is also usable in other communities within 15 miles thereof to which no channel has been specifically allocated (1 RR 53:607 (b)). Furthermore, so long as transmitter separation requirements are met and a "city-grade" signal is placed over the city to which the channel is allocated, an applicant has considerable latitude in specifying a transmitter site—frequently as much as 30 miles or more from

[1] Hereinafter cited as —— RR ——.

the city to which the channel is actually allocated (1 RR 53:610, 685).

Immediately prior to the changes here challenged, the following very high frequency (VHF) channels were listed in the Commission's table for the areas here involved: VHF Channel 7, Evansville, Ind.; VHF Channel 9, Hatfield, Ind. (a small town of fewer than 2500 persons 21 miles from Evansville); and VHF Channels 6 and 11, Louisville, Ky. Additional ultra high frequency (UHF) channels had also been allocated to Evansville and Louisville—at a time when the Commission was proceeding on the then justified (but since disproved) assumption that the intermixture of VHF and UHF channels in the same markets and the same general areas would result in the manufacture of nothing but all-channel receivers and that UHF channels would thus become in due course "an integral part of a *single*, nationwide television service."[1]

With VHF Channels 7 and 9 "tied up" in comparative hearings, two stations began operating in late 1953 on the UHF channels which had been allocated to Evansville. However, a UHF station in Louisville which went on the air about the same time, confronted as it was with competition from two prefreeze VHF stations, was forced to suspend operations in the spring of 1954. The Evansville UHF stations, fearing a similar fate when the Channel 7 hearing was resolved, petitioned the Commission to "deintermix" Evansville by reserving Channel 7 for educational use. In turning down that request in January 1955, the Commission called attention to the fact that the relief thus sought would not effectively deintermix the Evansville area because Channel 9 would still be allocated to Hatfield, only 21 miles away (11 RR 909, 911).

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[1] Sixth Report of April 14, 1952, 1 RR Pt. III, p. 91:664.

Profiting from this ruling the Evansville UHF stations broadened their petition to include the removal of both Channels 7 and 9 (see R. 295-328). Pursuant to this request, and as one of five so-called "pilot" deintermixture proceedings, the Commission on March 31, 1955 instituted rule-making proceedings looking toward the non-utilization of Channels 7 and 9 for commercial purposes in the Evansville area (20 Fed. Reg. 2197). However, in November 1955, on the premise that the intermixture concept had been "basic" to its 1952 allocation table and that the problem was one which should not be handled on a piecemeal basis, the Commission dismissed the five so-called "pilot" proceedings "without prejudice", and concurrently therewith instituted a general rule-making proceeding to consider allocations on an over-all basis. 13 RR 1541; 13 RR 1522; 20 Fed. Reg. 8501 (Docket No. 11532).

On June 26, 1956 the Commission issued a Report and Order, on the basis of data submitted in its over-all proceeding (Docket No. 11532), in which it concluded that its original intermixture policy was "a failure"[1]; that UHF stations could not survive in *areas* receiving a Grade A service from two or more VHF stations; that the mistaken intermixture policy should be corrected in two ways—by a possible long-range shift of all television to UHF and by the deletion (as an interim measure) of VHF channels in areas where UHF had obtained a foothold, and by utilizing those deleted VHF channels in areas which were already predominantly VHF (*Second Report on Deintermixture*, 13 RR 1571).

Concurrently therewith the Commission on its own motion reinstituted its five "pilot" (and eight other) proceedings looking toward allocation shifts designed to improve the opportunities for effective competition in

[1] See *Jacksonville Journal Co.* v. *Federal Communications Commission*, 101 U.S. App. D.C. 12, 13, 246 F.2d 699 (1957).

various markets, including Evansville (Docket No. 11757).[1] In its Notice relating to Evansville, the Commission stated that rule making (to reserve Channel 7 in Evansville for educational use and to substitute a UHF channel therefor) was proposed "in accordance with the general objectives" outlined in the June 26, 1956 Report and Order (13 RR 1571), and invited comments from interested persons who supported or opposed the proposal, including those who believed the proposed amendment "should not be adopted in the form set forth herein" (R. 1).

In Comments filed December 3, 1956 the Evansville UHF stations (as in 1955) asked that neither 7 nor 9 be allocated for commercial use in the Evansville-Hatfield area (R. 295-328). The defunct UHF station in Louisville went one step further as it likewise did in 1955—it asked that Channel 7 be shifted to Louisville. In a pleading filed December 28, 1956, the date specified for reply comments, petitioners, who were still involved in a hearing to determine to whom Channel 9 should be awarded, moved to strike all proposals dealing with Channel 9 (R. 474-476).

In a Report and Order released March 1, 1957 (R. 755-770) the Commission decided to deintermix the Evansville-Louisville areas—by instituting a show-cause proceeding to shift Channel 7 from Evansville to Louisville, by substituting a UHF assignment therefor in Evansville, and by shifting Channel 9 from Hatfield to Evansville and reserving it for educational use.[2]

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[1] The results reached by the Commission in several of these several deintermixture proceedings, instituted by Notices of June 26, 1956 and concluded by Reports released March 1, 1957 (concurrently with Evansville) have been before this Court on certiorari during the October 1958 term (Nos. 235, 242, 516, and 517; see also No. 889).

[2] Having adopted in the interim a transmitter-to-transmitter rather than post-office-to-post-office rule, Channel 9 could be al-

Petitioners sought review in the court below, raising a single question—whether the Commission's notice of June 26, 1956 (R. 1-2) was adequate to warrant the changes which it adopted March 1, 1957.[1] American Broadcasting-Paramount Theatres, Inc. (ABC), as a television network interested in three or more equally competitive facilities in as many markets as possible, actively participated in the foregoing proceedings looking toward the deintermixture of the Evansville area to all-UHF and the Louisville area to all-VHF (R. 756). It intervened in the court below pursuant to 47 U.S.C. Sec. 402(c) and 5 U.S.C. Sec. 1038.

ARGUMENT

1. ABC is in full agreement with petitioners that "notice" of intention to change a specific channel assignment in one city would not ordinarily permit the Commission to make shifts of channel assignments in other cities. However, in view of the over-all expressed purpose of the instant proceeding and its involved antecedents, ABC is of the view that petitioners had notice (actual and formal) of the possible ramifications of the June 26, 1956 rule-making proposal and were in no way

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located to Evansville itself, without using the 1953 subterfuge of allocating it to the nearby town of Hatfield (see 13 RR 1571, 1582, para. 32).

[1] The licensee of Channel 7 in Evansville (the petitioner before this Court in No. 889) raised the same (and additional) questions in a petition for reconsideration. In rejecting that petition the Commission, after making reference to the numerous proposals and counterproposals which had been submitted in the various proceedings to deintermix the Evansville area, concluded that all interested persons had had adequate notice (actual and formal) of the possible ramifications of the Evansville proceeding, and that resulting changes were in the public interest (R. 919-923). Following this action, the ungranted applicants for Channel 9 in Hatfield filed new appeals in the court below, again limited to the notice question.

prejudiced or misled by the form of the notice there given.

Evansville and Hatfield are only 21 miles apart (R. 758, para. 9). In 1950 Evansville had a population of 128,636 and Hatfield a population of fewer than 2500 persons. In its 1952 allocation table, since no channels were assigned to Hatfield, it is apparent that the Commission expected this small community to be served by the channels allocated to nearby cities (Owensboro, Ky. and Evansville, Ind.). Upon subsequently learning in 1953 that Channel 9 could be "dropped into" Hatfield, but not into Evansville or Owensboro because of then prevailing post-office-to-post-office (rather than transmitter-to-transmitter) separation requirements, Hatfield became the accidental recipient of a VHF assignment, an allocation which the Commission knew would provide a second VHF signal "in the [Owensboro-Evansville] area" (9 RR 963, 964; see also 11 RR 909, 911; cf. R. 755-756, para. 28). Each of the petitioners, with their roots in Owensboro, filed separate applications for this so-called "Hatfield" channel—which they knew would serve out a distance of 50-70 miles (and hence cover the populous Owensboro-Evansville area).

With allocations in this posture, the Commission in January 1955 denied a petition by the Evansville UHF stations to reserve Channel 7 for educational use, by noting that the relief thus sought would *not* effectively deintermix Evansville because Channel 9 would still be allocated to Hatfield (11 RR 909, 911). The Evansville UHF stations thereupon asked that both 7 and 9 be deleted; comments were invited thereon by notice issued March 31, 1955; petitioners duly participated therein (see 13 RR 1511, 1513). Following the dismissal "without prejudice" of this proceeding and the institution of an over-all allocation proceeding (Docket No. 11532), the Commission concluded by Report and Order released

June 26, 1956 (13 RR 1571) to utilize "deintermixture" on an interim basis—where such action would "improve the opportunities for effective competition among a greater number of stations" (13 RR 1571, 1581, para. 31). From the criteria listed in paragraph 31 of that Report (cf. R. 757-758), it was apparent that whether a given city should be deintermixed was an "area" matter—whether areas (naturally well beyond the city involved) "would lack service" if the wider-coverage VHF channels were deleted; whether UHF stations were operating "in the area", whether the existence of VHF channels in nearby communities would leave the *area* still intermixed, etc. (13 RR 1571, 1582; R. 757, para. 8).

On its own motion, concurrently with the issuance of its June 26, 1956 Report and Order, the Commission reinstated the five "pilot" and eight other proceedings, including Evansville (R. 1). The Notice pertaining to Evansville, in listing the channel changes which the Commission proposed, indicated that Channel 7 in Evansville would be reserved for educational purposes and that a UHF channel would be substituted therefor (R. 1-2). However, the Notice further stated that it was being issued "in accordance with the general objectives" outlined in the June 26 Report and Order and requested all persons who filed comments "to direct their attention to matters discussed in paragraph 31" of that Report—a clear indication that the basic matter in issue was whether the Evansville *area* (i.e., Evansville, Hatfield, and their environs) should be deintermixed (R. 1). As heretofore noted, the Commission had been on record since January 1955 that the removal of Channel 7 from Evansville (without taking comparable action with respect to Channel 9 allocated to the nearby town of Hatfield) would not effectively deintermix the Evansville market (11 RR 909, 911). The Notice further stated that the Commission would consider comments from interested persons who were of the view that deintermixture should

not be effectuated by adopting changes in the Table "in the form" suggested by the Commission therein (R. 1).

Furthermore, following a formal petition by Mid-America that Channel 7 be shifted to Louisville to improve the competitive situation in that market and that the June 26 Notice be amended accordingly (R. 4), the Commission by action formally published in the *Federal Register* on October 25, 1956 (21 Fed. Reg. 8196) let it be known that interested persons in the Evansville and in the other 12 proceedings would be permitted to present *related* alternatives in comments due to be filed on December 3, and that such proposals would be duly considered by the Commission in arriving at a final determination (R. 211).

In line with that duly published pronouncement, persons interested in the Evansville proceeding (in comments filed December 3, 1956) came forward with a number of related proposals. The UHF stations in Evansville renewed their 1955 request that the area be deintermixed by deleting (from commercial use) both Channels 7 and 9 (R. 295-328). Mid-America likewise proposed that Channel 9 be deleted from Hatfield (R. 274), along with the shift of Channel 7 from Evansville to Louisville (R. 245-294). Petitioners must be presumed to have had knowledge of the June 26 Notice and of the October 25, 1956 action, since both were duly published in the *Federal Register*. That petitioners had actual notice of these proposals is apparent from their motions to strike all comments dealing with Channel 9 (R. 474-476). Had they in fact been taken by surprise, they could have requested leave to file additional comments (R. 1). Following the adverse Report and Order of March 1, 1957, they could have sought reconsideration (47 U.S.C. Sec. 405), as did the petitioner in No. 889.

Thus, we submit that petitioners had both formal and actual notice of the possible ramifications of the Com-

mission's proposal to deintermix Evansville, and a full opportunity to rebut the various related suggestions which other persons advanced and which the Commission in substance adopted (Cf. R. 766, para. 28). The June 26 Notice (R. 1), making express reference to the Report and Order released the same day in Docket No. 11532 (13 RR 1571), adequately made known the "subjects and issues involved," thereby complying with the requirements of Section 4 of the Administrative Procedure Act (5 U.S.C. Sec. 1003). Concededly, the Notice in the Evansville proceeding could have been more explicit. But from the references there made to its general Report and Order of the same date in Docket No. 11532 (13 RR 1571), and particularly paragraph 31 thereof (13 RR 1571, 1581, R. 1, cf. R. 757), petitioners who had been following earlier proceedings affecting the Evansville area (13 RR 1511, 1513) could not have but known that the so-called Hatfield channel (Channel 9) was inextricably intertwined with any "deintermixture" of Evansville.

In short, notwithstanding petitioners' contrary assertions (Pet. p. 9), the decision below is not of "broad significance." It turned on the adequacy of a particular Notice issued in a case with peculiar and lengthy antecedents. The situation is one not likely to recur.

2. With due deference to petitioners (Pet. p. 9) the decision below is not in conflict with *Hotch* v. *United States*, 212 F.2d 280 (C.A. 9, 1954). As the court below pointed out (Pet. App. 14a), that case involved the validity of regulations adopted in a proceeding where (unlike here) no notice of any kind was published in the *Federal Register*.

CONCLUSION

The decision below is correct, no important issue calling for further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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